

SURVEY OF LIABILITY INSURANCE COVERAGE



BUREAU OF INDIAN AFFAIRS

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Table of Contents

Executive Summary	1
Introduction	3
Prior Studies	4
Reporting Requirement	5
Advisory Group	5
Limitations of this Report	5
Overview of Private Insurance Coverage	6
Insurance Claims	8
Insurance Claims Compared to Tort Claims	9
Workers' Compensation Insurance	9
BIA Administrative Actions	8
Recommendations	10
Conclusion	11

Appendices

I	Executive Summary, <i>Bureau of Indian Affairs Liability Insurance Study</i>
II	Executive Summary, <i>Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts</i>
III	Advisory Group Members
IV	Survey

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Executive Summary

The *Indian Tort Claims and Risk Management Act of 1998*, (Act) was enacted as Title VII of the *Department of the Interior and Related Agencies Appropriations Act, 1999*. The law directed the Bureau of Indian Affairs (BIA) to conduct a comprehensive survey of the degree, type and adequacy of liability insurance of Indian Tribes. The Act also required that BIA report the survey results to Congress. The BIA was not able to meet all of the statutory reporting requirements, for the following reasons:

- Tribal response to the survey was voluntary. Approximately 25 percent of tribes completed portions of the survey;
- Most tribes did not submit information on claims; and
- The BIA does not have insurance professionals who could conduct tribe-by-tribe risk assessments and estimate potential exposure to liability.

Insurance Claims Compared to Coverage under the Federal Tort Claims Act (FTCA)

Sixty-one tribes provided a three-year history of insurance claims. These tribes reported that more than 19,000 claims had been filed. In a recent report, the General Accounting Office identified only 228 FTCA claims submitted for all tribally-operated BIA programs during a three-year period. Tribes operating gaming enterprises had significantly more insurance claims than non-gaming tribes. More than half of the claims, however, were for Workers' Compensation. Tribes can recover the cost of Workers' Compensation insurance attributable to Federal program operations through indirect cost rates.

Better Information is Needed on FTCA Coverage and Exclusions

Studies have found that neither tribes nor insurance carriers have enough information on FTCA coverage to make informed decisions that might lead to a reduction in rates for liability insurance. BIA will issue informational material and identify DOI employees who can provide authoritative answers to FTCA questions.

Recommendations

A previous insurance study recommended that an on-line claims registry be used to improve consistency in interpreting FTCA and to help tribes and insurers determine whether a particular claim is likely to be covered by FTCA. If Congress agrees that such a registry should be developed, legislation would be needed to place the authority and responsibility with one of three Departments involved with processing FTCA claims against Self-Determination contractors: the Department of Justice, the Department of Health and Human Services, or the Department of the Interior.

Unique legal issues have emerged since FTCA coverage was extended to tribal contractors. Clarification of these issues through legislation would provide greater certainty to both tribal contractors and individuals who file an FTCA claim.

The BIA also recommends that the statutory requirement to report annually to Congress on liability insurance coverage be repealed.

INTRODUCTION

The *Federal Tort Claims Act* (FTCA) provides a limited waiver of the United States' sovereign immunity and establishes administrative and judicial processes through which individuals may seek compensation from the Federal Government for injuries sustained as a result of certain acts or omissions of Federal employees (Title 28 U.S.C. § 2671 *et seq.*)

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury of loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. [28 U.S.C. § 2679(b).]

Once administrative remedies have been exhausted, Federal courts have exclusive jurisdiction to hear FTCA claims.

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. [28 U.S.C. § 1346(b)]

For the last decade, the FTCA remedies have been available to individuals injured as a result of acts or omissions of tribal employees carrying out functions under a Self-Determination contract, grant or compact.

In its original version, the *Indian Self-Determination and Education Assistance Act* authorized the Secretaries of the Interior (DOI) and Health and Human Services (HHS) to require that Indian tribes obtain adequate liability insurance as a prerequisite to Self-Determination contracting.¹ The sharp escalation in the cost of all insurance, including medical malpractice insurance, in the mid-1980's and the knowledge that some tribes had to divert program funds to purchase the required insurance, led Congress to begin consideration of other options. Between 1987 and 1994, a number of provisions were enacted to extend the coverage of the *Federal Tort Claims Act* (FTCA) to Indian tribes and tribal organizations operating programs under the authorities of the *Indian Self-Determination Act*, as amended.²

¹ Title 25, U.S.C. § 450f(c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions. (88 Stat. 2206)

² For a more complete discussion of the legislative history of FTCA coverage, see the General Accounting Office Report, ***Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts***, (GAO/RCED-00-169).

FTCA coverage is extended only to tribal programs operated through the authority of Self-Determination awards. It does not cover program operations funded by any Federal agency other than DOI and HHS, nor does it extend to businesses or programs operated by Indian tribes with tribal funds or other Federal funds.

PRIOR STUDIES

Both the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) funded earlier studies of issues surrounding tribal liability insurance. In 1991, BIA contracted with Foxx & Company to conduct a study of liability insurance coverage. The objectives of this study were to:

- Develop a central database of liability exposure and losses unique to Indian contractors and grantees;
- Evaluate the cost effectiveness of the present methods of providing liability insurance;
- Evaluate the cost effectiveness of providing liability coverage for tribal contract/grant activities on a risk-management, self-insured basis;
- Evaluate the cost effectiveness for continuing coverage under Federal Tort Claims Act, including a statement of cost differences between FTCA and private insurance and self-insurance;
- Conduct an actuarial study based on the actual loss history of grantees/contractors;
- Perform a cost/benefit and policy analysis of pooling and loss prevention compared with the purchase of traditional liability insurance; and
- Prepare a five-year funding plan for providing liability insurance.

In 1997, IHS contracted with the Center for Health Policy Research at The George Washington University Medical Center to conduct an assessment of tribal access to private liability insurance. The primary purposes of the study were to:

- Examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act, and to assess the coordination of that insurance with tribal liability coverage provided under the FTCA;
- Identify barriers to the appropriate pricing of private liability insurance; and
- Recommend strategies that will assist tribes in assessing their need for private liability insurance and assist in obtaining such insurance at reasonable prices.

The contractor for the BIA study was unable to deliver most of the data requested and only 12 tribes provided detailed information for the IHS study. Executive summaries from the two resultant reports are included as Appendix I and Appendix II, respectively.

REPORTING REQUIREMENT

The *Indian Tribal Tort Claims and Risk Management Act of 1998* (Act) was enacted as Title VII of the *Department of the Interior and Related Agencies Appropriations Act, 1999*. This report is submitted pursuant to the provisions of section 704 of the Act:

SEC. 704. STUDY AND REPORT TO CONGRESS

(a) IN GENERAL –

- (14) STUDY. – In order to minimize and, if possible, eliminate redundant or duplicative liability insurance coverage and to ensure that the provision of insurance to Indian tribes is cost-effective, the Secretary shall conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study.
- (15) CONTENTS OF STUDY. – The study conducted under this subsection shall include –
 - (A) an analysis of loss data;
 - (B) risk assessments;
 - (C) projected exposure to liability, and related matters; and
 - (D) the category of risk coverage involved, which may include –
 - (i) general liability;
 - (ii) automobile liability;
 - (iii) the liability of officials of the Indian tribe;
 - (iv) law enforcement liability;
 - (v) workers' compensation; and
 - (vi) other types of liability contingencies.
- ASSESSMENT OF COVERAGE BY CATEGORIES OF RISK. – For each Indian tribe, for each category of risk identified under paragraph (2), the Secretary, in conducting the study shall determine whether insurance coverage or coverage under chapter 171 of title 28, United States Code, applies to that Indian tribe for that activity.

(b) REPORT. – Not later than June 1, 1999, and annually thereafter, the Secretary shall submit a report to Congress that contains legislative recommendations that the Secretary determines to –

1. be appropriate to improve the provision of insurance coverage to Indian tribes; or
2. otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

ADVISORY GROUP

To address the reporting requirement, the BIA convened an *ad hoc* working group that included tribal leaders, attorneys who represent Indian tribes, insurance industry representatives, consultants who specialize in Indian policy matters, and Federal employees. A list of the participants is provided in Appendix III. The advisory group held three formal meetings that resulted in the development of a survey instrument (Appendix IV) that was sent to all Indian tribes.

LIMITATIONS OF THIS REPORT

The Act specified a number of study requirements that the BIA was unable to meet:

- **Information on all Indian Tribes**

The survey was to cover “each Indian tribe.” While the BIA sent the survey to all tribes, most tribes chose not to respond. BIA received responses from about one-quarter of the Federally-recognized tribal governments. The overall response rate is skewed due to the large number of small tribes in Alaska and California. Only 17 percent of Alaska tribes and 39 percent of California tribes responded. Responses were received from almost 60 percent of the rest of the tribes, however, the majority of those who did respond completed only portions of the survey. Tribes were under no legal obligation to complete the survey and a number of tribes are hesitant to divulge proprietary information.

- **Risk Assessments and Projected Exposure to Liability**

The BIA has no capacity to conduct risk assessments for all tribal activities. Insurance professionals would have to work with each tribe to review all operations, facilities, staff qualifications, training and safety programs, and other factors to determine the risks and potential exposure of each tribe. It should be noted, however, that the 1991 *Liability Insurance Study* found that Indian organizations had no unique liability exposure. Further, because Indian tribes are afforded sovereign immunity, those without insurance coverage essentially have no exposure to liability unless they agree to waive the defense of sovereign immunity.

- **Assessment of Coverage by Categories of Risk**

The Act states that for each Indian tribe and for each category of risk, the BIA is to determine whether insurance coverage or FTCA coverage applies “for that activity.” Workers’ Compensation claims are not covered by FTCA, nor, in some circumstances, are claims against tribal law enforcement officers for intentional torts. The answer with respect to the other categories such as automobile and general liability, is: “It depends.”

For example, if driver of a tribal vehicle causes an accident, the injured party could file a claim under FTCA if the automobile was in use **at the time of the accident** for an activity related to a self-determination contract. If the vehicle was in use for general tribal operations or for a purpose unrelated to a self-determination contract, the claim would not be covered under FTCA and would be referred to the insurance carrier. Similarly, tribal employees may work on different projects, some of which are funded by self-determination awards, some of which are funded by other Federal grants that are not covered by FTCA, and some that are tribal operations. Thus, it is not possible to determine, in advance, whether FTCA will provide coverage. It depends on what an employee is doing at the time a third party is injured.

OVERVIEW OF PRIVATE INSURANCE COVERAGE

Tribal response to the survey instrument was voluntary. The BIA received responses directly from 144 tribes. Few tribes, however, completed the entire survey instrument. Insurance carriers provided information on coverage, but not on claims, for 65 other tribes. The following chart provides a state-by-state breakdown showing the number of Indian tribes in the State, the number of survey responses, and the number of tribes that indicated they had private liability coverage.

SUMMARY OF SURVEY RESPONSES BY STATE

State	Tribes	Responses	Respondents with Insurance	State	Tribes	Responses	Respondents with Insurance
AL	1	1	1	MT	7	5	5
AK	232	40	20	NC	1	1	1
AZ	17	11	11	ND	5	1	1
CA	102	40	33	NE	3	3	3
CO	2	0	0	NM	22	11	11
CT	2	2	2	NV	22	5	5
FL	2	1	1	NY	7	2	2
IA	1	0	0	OK	19	18	17
ID	5	4	3	OR	9	7	7
KS	4	2	2	RI	1	0	0
LA	4	2	2	SC	1	0	0
MA	1	0	0	SD	8	1	1
ME	4	1	1	TX	3	2	2
MI	12	9	9	UT	4	1	1
MN	12	6	6	WA	28	26	26
MO	1	1	1	WI	11	4	4
MS	1	1	1	WY	2	1	1
Totals	403	121	93	Totals	153	88	87

While the overall response rate might indicate that the answers are not necessarily representative of Indian country as a whole, it is useful to further group the responses. Alaska and California have large numbers of very small tribes, many of which operate no Federally-funded programs and have no business enterprises. As an example, in Alaska the BIA funds 19 Self-Governance compacts through which services are provided to 161 Alaska Native villages and Indian tribes. If the responses are adjusted to separate tribes in the States of Alaska and California, more than half of all other tribes responded directly or through an insurance carrier to that portion of the survey asking whether a tribe has insurance, and 97 percent of these tribes answered in the affirmative.

ALASKA AND CALIFORNIA COMPARED TO ALL OTHERS

	Tribes *	Response s	Response Rate	Respondents with Insurance	% of Respondents with Insurance
AK	232	40	17%	20	50%
CA**	102	40	39%	33	83%
All Others	222	129	58%	125	97%
Totals	556	209	38%	180	86%

* Number of tribes at the time of the survey.

** The survey was completed prior to approval of gaming compacts between the State of California and California Indian Tribes. Under the terms of the compacts, all tribes operating Class III gaming must have liability insurance.

INSURANCE CLAIMS

Of the 144 tribes that responded directly to BIA, 29 did not have insurance. Three of the 29 tribes reported that they had gaming operations while the other 26 did not. Of the 115 that had insurance, 70 completed the portion of the survey requesting information on claims; nine of these respondents reported that no claims had been filed with them for the preceding three years. Of the nine tribes with no claims, two reported that they had gaming operations while seven had no gaming activities.

Of the remaining 61 tribes that reported claims had been filed during the previous three years, 21 tribes had no gaming and 40 tribes had gaming enterprises. As gaming tribes generally have more employees than non-gaming tribes and have larger numbers of non-members visiting tribal facilities, it is useful to display separately the reported claims history of the two groups. The Navajo Nation was one of the 21 non-gaming tribes that provided claims data. The Navajo Nation is self-insured and has an operational risk management program. The Nation has developed a body of tort law and tort claims against the Nation that are not covered by FTCA are heard in tribal court. While the number of claims reported by the Nation is reasonable given the size and scope of the Nation's operations, these claims have been excluded from the table below in order to provide a more accurate representation of the average number of claims and payments.

STATUS OF LIABILITY CLAIMS FILED (1996 - 1998)*

Liability Coverage	Claims Filed		Claims Paid		Amount Paid (\$000)		Pending, Denied or Referred Claims	
	NG(20)	G (40)	NG (20)	G (40)	NG (20)	G (40)	NG (20)	G (40)
Automobile	32	2,258	32	1,335	46	1,872	0	923
General	15	5,188	7	1,632	127	2,713	8	3,556
Other	8	869	5	554	17	1,718	3	315
Police Professional	0	7	0	0	0	0	0	7
Workers' Comp.	94	9,600	88	8,352	103	13,100	6	1,248

Totals	129	17,882	112	11,833	273	19,363	17	6,049
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* Status as of Summer 1999.

INSURANCE CLAIMS COMPARED TO TORT CLAIMS

In a recent report on Indian Tort Claims (RCED-00-169), GAO identified a total of 228 FTCA claims that had been filed for all tribally-operated BIA programs during the three year period of FY 1997 - FY 1999. If the Navajo claims are added to the data in the table above, more than 19,000 insurance claims were filed with just 61 tribes in the three-year period of FY 1996 - FY 1998. While it has been suggested that the relatively low number of FTCA claims results from a lack of familiarity on the part of tribes, to the extent that a tribe has had both insurance claims and FTCA claims, it is also reasonable to assume that the tribe recognizes the limitations of FTCA coverage and refers injured parties to insurers when the injury would not be compensable under FTCA.

WORKERS' COMPENSATION INSURANCE

Clearly, the bulk of insurance claims identified in the table on the preceding page are for injuries suffered by tribal employees. Claims of this type are not covered by FTCA. Tribes may recover the cost of workers' compensation insurance attributable to tribal personnel employed under Self-Determination awards within their indirect cost payments.

BIA ADMINISTRATIVE ACTIONS

The February 1998 report prepared for the Indian Health Service, *Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts*, identified a number of operational issues surrounding FTCA coverage and offered recommendations to address the problems. Although some of the recommendations are beyond the current technological capacity of the BIA and others would require nation-wide coordination of three separate Departments (DOI, HHS, and Justice), several of the recommendations can be implemented by BIA. These are identified below.

Problem: The authoritative information about FTCA coverage for tribal contractors is geared more toward lawyers than lay people.

- C Develop informational materials written for the layperson that describe the immunity provided to self-determination contractors under FTCA and, to the extent possible, identify the types of activities that may not be protected to assist tribes in understanding the extent to which they may need supplemental private liability insurance. This guidance should be issued by the Federal government so that it may be shared with insurance companies as authoritative material.

Problem: The majority of tribes said that they did not know enough about what the FTCA would cover to be able to determine when private insurance products were duplicative.

- C Develop examples of insurance contract language that would make the purchased insurance supplementary to the FTCA immunity.

Problem: Tribes have difficulty in identifying the proper individual within the Department

of the Interior to contact or to work with to answer FTCA questions or resolve problems. They report frustration in being shuffled from person to person and from office to office.

- C** Provide all tribal contractors with the name, address, and telephone number of those individuals in the Department who can answer questions regarding FTCA coverage and claims.

The BIA plans to address each of these issues by December 31, 2000.

RECOMMENDATIONS

The Act requires that annual reports be submitted to Congress that contain legislative recommendations that the Secretary determines to be appropriate to improve the provision of insurance coverage to Indian tribes or to achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

C Actions to Improve the Provision of Insurance Coverage

Most tribes opt to carry liability insurance because of the limited coverage that FTCA affords. The IHS study recommended the development of an on-line claims registry organized by type, location and disposition of the claim for internal agency use to facilitate consistency in interpreting the FTCA. In addition, the study recommended that a publicly available data base, containing the same information as the claims registry, but without identification of the tribes or individuals involved, would help both tribes and insurance brokers better determine the likelihood of FTCA coverage for certain activities and would make it easier for tribes to avoid purchasing unnecessary levels of insurance coverage.

Because information for such a registry would have to be supplied by three Departments: HHS, Interior, and Justice, and by multiple organizations within each of the Departments, the Administration will work internally and with Congress to: (1) identify the agency responsible for development and maintenance of the data base; (2) ensure that the affected agencies report the required data in a timely manner; and (3) manage interagency data base development.

C Actions to Provide Relief to Persons who are Injured

The General Accounting Office has identified four unique legal issues that have emerged from recent litigation of tribal FTCA claims:

1. FTCA does not provide statutory authority for the removal of FTCA cases filed in tribal courts.
2. Court decisions have differed on whether the "law of the place" should be tribal law for those incidents occurring on Indian land or state law as the phrase has historically been interpreted.
3. Legal arguments have been made that FTCA bars claims against tribal law enforcement officers for intentional torts, such as assault, battery, false imprisonment, and false arrest because tribal officers are not considered "investigative or law enforcement officers of the United States Government."

4. There are legal questions regarding FTCA coverage for tribal officials who exercise oversight over contracted programs but who do not participate in the day-to-day program operations.

3. Other Recommendations

The Act requires that the Secretary provide annual reports to Congress on liability coverage. The BIA recommends that this requirement be repealed.

1. The response rate to the initial survey was only 25 percent and that is certain to decline if the BIA sends out annual surveys;
2. Liability coverage generally does not change significantly from year to year; and
3. As a growing number of tribes expand the scope of their operations, Self-Determination awards represent a smaller percentage of tribal operations, thus there is a decreasing correlation between the availability of FTCA coverage for contracted programs and tribal decisions to purchase liability insurance.

CONCLUSION

From the data derived from the survey, it appears that well over 90 percent of Indian tribes that operate programs funded by the BIA carry liability insurance to provide relief to those who may suffer personal or property damage or loss as a result of tribal activities and that percentage can be expected to increase in the future as tribes continue to expand the scope of their operations and to increase the services that they provide to tribal members.

Coverage under the Federal Tort Claims Act has had little impact on tribal operations, as ten years after the extension of FTCA coverage to Self-Determination contractors, the majority of claims against Indian tribes are still covered by insurance policies purchased by the tribes rather than by FTCA. Viewed in the most positive light, this can be seen as a result of diversification of tribal programs and operations so that the BIA and IHS are not the sole means of support for tribal operations. It is likely, however, that the relatively complex FTCA processes and coverage limitations have prevented tribes from taking full advantage of the protections that are available under FTCA.